Mangilal v. Suresh Chander

SB Civil Regular 1st Appeal No.42/1987

Date of Judgment: 12th February, 2007.

PRESENT

HON'BLE MR.JUSTICE BHAGWATI PRASAD

Mr.K.L.Jasmatiya for the appellant.

Mr.Himanshu Maheshwari for the respondent.

The present appeal has been filed by the appellant defendant against the plaintiff-respondent being aggrieved by the decision of the court of Additional District Judge No.1 Udaipur dated 03.04.87 in civil original suit No.26/1975.

The plaintiff respondent filed the suit against the appellant defendant alleging inter alia that there is a premise owned by the appellant defendant numbered as 13 Lal Ghat , Udaipur. On 17.01.81 an agreement was entered into between the parties for the sale of the said premises for a consideration of Rs.60,000/- . Rupees 10,000/- were advanced by the plaintiff- respondent and in part performance the appellant defendant handed over possession of

the two rooms on first floor along with a tin shed and the roof. Remaining three rooms being in possession of the tenants were not handed over for the reason that they were occupied by the tenant but the appellant defendant promised that within three months he will get the rooms vacated and hand over the possession and after that the sale deed would be executed and remaining consideration of Rs.50,000/- will be paid to the appellant defendant . Other usual conditions were incorporated in the agreement. In the due course of time appellant defendant failed to execute the sale deed as promised.

A notice was issued to the appellant-defendant on 07.02.82 as the term of the agreement was going to expire. The appellant defendant did not answer the notice but kept on orally promising that he is trying to fulfil his part of the obligations under the contract. The plaintiff-respondent in the meanwhile, arranged the amount of Rs.50,000/- from various sources but since the appellant defendant did not do his part of the obligations, a further notice was given to the appellant defendant which he refused to accept. Thus the plaintiff prayed for grant of a decree of specific performance in his favour. In the alternative, compensation was claimed. The appellant defendant in his reply denied the execution

of agreement for sale. It was alleged on part of the appellant defendant that in the year 1981 his wife expired and he had lost his capacity to rationalise his actions and, therefore, there is no question of his having agreed to sell the property. He was under treatment as a psychiatric patient . This also had been averred that may be the plaintiff-respondent has taken advantage of the unstable mind of the appellant defendant and got the agreement executed. On behalf of the aforesaid pleadings of the parties following issues were framed:-

> "1- क्या प्रतिवादी ने दिनांक 17.11.83 को विवादास्पद सम्पति के विक्रय का इकरारनामा वादी के पक्ष में निष्पादित किया।
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> 2- आया प्रतिवादी 13 अक्टोम्बर 81 से 2.1.82 तक मानसिक रोग से पड़ित था व उसके सोचने-समझने की बुद्धि पूर्ण रूप से अस्त-व्यस्त थी एवं इकरार बेह होशोहवाश एवं जानकारी में नहीं लिखा ।
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> 3- आया इकरार बेह प्रतिफल विहीन होकर अवैध है।
>
> 4- क्या प्रतिवादी विशेष हर्जा-खर्चा 10,000/- वादी से पाने का इकदार है।
>
> 5- प्रतिकार क्या है।"

Deciding issue No.1 the trial court held that though in defence the appellant defendant has come with a case that he had not signed the agreement, but he has admitted that on agreement Ex.P/1 there are his signatures 'x y' at the back. Thus one signature on the stamp paper are admitted by the appellant. Further the court had compared the signatures on Ex.1 along with the signatures on Vakalatnama and the written statement. The court found that the signatures tally with each other. Thus, the court found that the signatures on the alleged agreement are of the appellant defendant. Along with Ex.1, Ex.2, a map was signed by the appellant defendant and given to the plaintiff. Thus, issue No.1 was decided in favour of the plaintiff respondent.

Issue No.2 which related to the unstable mind and psychiatric nature of the decease of the appellant-defendant the trial court, after discussing the evidence has come to the conclusion that the wife of the appellant defendant died on 12.12.79. That on 17.11.81 it is not possible to conclude that the mental state of the appellant was unstable and it has been concluded by the trial court that it was written on free will understanding the application of the acts performed by the appellant defendant .

Issue No. 3 regarding the fact of passing on of Rs.10,000/- which has been recorded in Ex.1 has been held against the appellant defendant and it has been held that Ex.1 is for consideration .

Issue No.4 has been decided against the appellant defendant that is in relation to the damages to the plaintiff respondent. In issue No.5 the trial court observed that the plaintiff respondent is entitled to get a decree of specific performance.

Assailing the decree the learned counsel for the appellant submitted that in terms of Section 16 of the Specific Relief Act 1963 (hereinafter referred to as 'the Act of 1963') as provided in Section 16(c) the plaintiff respondent is required to aver and prove that he has performed and is always ready and willing to perform the essential terms of the contract which are to be performed by him. The learned counsel for the appellant urged that though the averments have been made that has not been established and proved that the plaintiff had in his possession a sum of Rs.50,000/- which was required to be paid to the appellant defendant and, therefore, there was no compliance of Section 16 (c) of the Act of 1963 and since

this mandatory provision has not been established by the plaintiff -respondent mere averment is not sufficient, he was required to prove and in absence of the proof the suit could not have been decreed.

The learned counsel for the plaintiff respondent, per contra urged that the compliance of Section 16 (c) is held proved by the trial court on the facts of the case. As regards the fact of averment the learned counsel for the appellant defendant himself has not disputed the fact of agreement, in argument in Court. He only says that it has not been proved that the plaintiff respondent was ready and willing to perform his part of the contract because he never had the money. This argument is based on misconception. The sources have been indicated and the plaintiff has claimed that he had the money and as a follow up action the appellant was served with the notice. More than that cannot be said to be the requirement of law that he had the resources to perform his part of the contract. The argument is misconceived.

In the light of the arguments of both the parties if findings of the trial court are seen, then it can be safely be deemed that the trial court considered the findings of the parties and came to

the conclusion that money was available with the plaintiff respondent and the appellant defendant having not responded to the notice, have ignored to take note of the effect of the fact . In that view of the matter, the findings of the trial court are not liable to be disturbed on this count. Therefore, the arguments of the learned counsel for the appellant defendant deserves no favour for consideration and it cannot be said that requirements of Section 16 (c) of the Act of 1963 have not been fulfilled by the plaintiff -respondent.

The second argument raised by the learned counsel for the appellant is that in view of the provisions of Section 10 of the Act of 1963 it is not necessary to pass a decree of specific performance, if the plaintiff respondent has demanded compensation. In this regard the learned counsel for the appellant defendant has relied on a decision of the Supreme Court reported in JT 1996 (4) SC 733 (Kanshi Ram v. Om Prakash Jawal & Ors). The order in question has not been decided by the Hon'ble Supreme Court purely on the question of law. The case had proceeded on the ground that a sum of Rs.10 lacs was proposed in lieu of Rs.12,000/- alternative relief claimed by the plaintiff. No such suggestion is coming forthwith in this regard by the appellant – defendant and,

therefore, it cannot be said that the case in question has a binding precedent on the question of interpretation of Section 10 of the Act of 1963. The appellant has further relied on a decision of the Hon'ble Supreme Court reported in Western Law Cases (SC) Civil 2000 (Dadarao & Anr. v. Ramrao & Ors.) The case in hand was decided by the Supreme Court in terms of the contract. The agreement itself had not indicated that the parties have agreed that if the agreement is not fulfilled the parties will settle for the compensation.

The learned counsel for the appellant-defendant, per contra, cited the Supreme Court case decided in the matter of P.C.Vargehse v. Devaki Amma Balambika Devi (AIR 2006 SC 145) wherein the Hon'ble Supreme Court has held as under:-

> "32. The submission of Mr.Reddy to the effect that this Court should not exercise its discretionary jurisdiction is stated to be rejected. No such contention has been raised before the High Court. Even otherwise it has not been shown having regard to the conduct of the parties as to why such a discretionary jurisdiction should not be exercised. An alternative plea of refund of earnest amount and damage cannot itself be a bar to claim a

> decree for specific performance of contract."

He has also relied on another decision of the Hon'ble Supreme Court in Motilal Jain v. Ramdasi Devi (AIR 2000 SC 2408) wherein the Supreme Court has held as under :-

> "12. The last contention of Mr. Choudhary that because the plaintiff has claimed compensation in lieu of specific performance so he is disentitled to claim the specific relief performance of the contract , is to be noted to be rejected. The plaintiff's claim was in accord with the provisions of Section 21 of the Specific Relief Act, 1963. Merely, because the plaintiff claims damages in a suit for specific performance of contract as alternative relief, it cannot be said that he is not entitled to the main relief of specific performance of contract itself."

Having given consideration to the law cited by the parties at Bar, I am of the considered opinion that alternative plea cannot bar the grant of decree of specific performance and in that

view of the matter, the second argument raised by the learned counsel for the appellant- defendant, is merit less. No other point was raised .

In that view of the matter, the findings of the trial court are not liable to be interfered, the same are, therefore, maintained. There is no force in the appeal the appeal is, therefore, dismissed.

(BHAGWATI PRASAD), J.

L.George